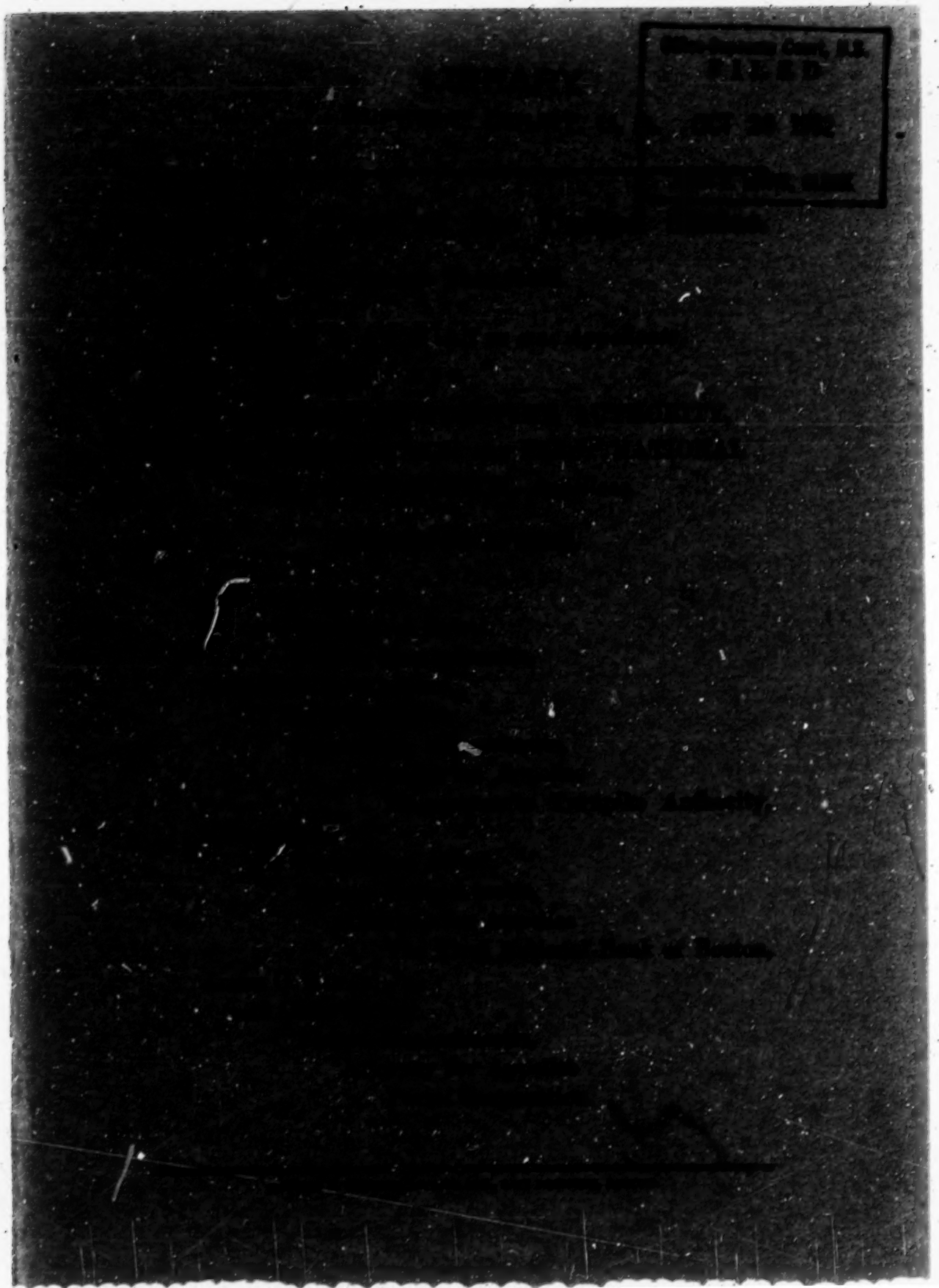

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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 473.

HARRY K. AHOYIAN ET ALI., *Appellants*,

v.

MASSACHUSETTS TURNPIKE AUTHORITY ET ALS., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

APPELLEES' MOTION TO AFFIRM.

The appellees, pursuant to Rules 16(1)(c) and 35 of the Revised Rules of this Court, move that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

This is an appeal from a judgment of a three-judge Court of the District of Massachusetts dated June 4, 1962. The District Court thereby dismissed an action in which the plaintiffs, eighteen property owners whose land had been taken, or was about to be taken by eminent domain,

sought as relief (*a*) to declare unconstitutional the Massachusetts Turnpike Act, chapter 354 of the Massachusetts Acts of 1952 as amended; (*b*) to declare takings of land thereunder "null and void and of no effect"; and (*c*) to enjoin, temporarily and permanently, any further proceedings by the Massachusetts Turnpike Authority, under that legislation, to construct an extension into the City of Boston of the existing trans-State Turnpike. The opinion dismissing the complaint, written for the unanimous three-judge Court by Circuit Judge Bailey Aldrich, is printed in the appellants' Jurisdictional Statement at pages 13-17.

A prior order denying the plaintiffs' application for a temporary restraining order, made on May 9, 1962, by United States District Judge Ford, of the District of Massachusetts, is not printed in the appellants' Statement. It is printed at page 26 hereof.

A memorandum denying a motion of the plaintiffs to vacate the June 4 judgment, denying plaintiffs' motion to grant plaintiffs a rehearing, and denying plaintiffs' motion to alter or amend the June 4 judgment, is not printed in the appellants' Statement. This order was dated June 21, 1962. It is printed at page 27 hereof.

An order denying a preliminary injunction, sought by Hyman Radler, one of the plaintiffs herein, in a separate Massachusetts Superior Court case raising the same issues as those in the instant federal case, is referred to at pages 9-10 of the appellants' Statement, but is not printed therein. This order was made on July 10, 1962, by Judge Tauro of the Massachusetts Superior Court. Judge Tauro's order is printed at page 28 hereof.

An opinion of the Massachusetts Superior Court in that action, dated September 19, 1962 which sustained certain special demurrers to various allegations of the State Court complaint and upheld the defendants' plea of *res judicata*, is described at pages 9-10 of the appellants' Statement, but

is not printed therein. That opinion, by Tauro, J., is printed at pages 28-31 hereof.

Questions Presented.

The statement of appellants (pp. 4, 5) lists twelve numbered questions as presented on this appeal. The appellees Massachusetts Turnpike Authority and others suggest that the Supreme Court may be assisted by a somewhat simpler statement of the substance of the questions, as the appellees see the case. They are as follows:

1. Is equal protection of the laws or due process of law denied under the Massachusetts Turnpike Act because there is no provision for public hearings on the laying out of the Turnpike between terminal points directed by the Legislature, when public hearings are required for the laying out by a commission of other state highways generally with no legislative directions of any kind as to any particular one?

2. Did the District Court err when it held that the plaintiffs must seek and exhaust the administrative procedures afforded by Massachusetts law for requiring the defendant Turnpike Authority to post security for land-takings, before the plaintiffs will be in a position to contend in court that the Turnpike Act gave them inadequate assurance of payment for their land?

The Turnpike Act and Construction Thereunder.

The original Massachusetts Turnpike Act, chapter 354 of the Acts of 1952, created the Massachusetts Turnpike Authority and empowered it to construct and maintain a toll express highway from a point "in the vicinity of the city of Boston" on the east to a point in or near to the boundary of the State of New York on the west (sec. 1, Jurisdictional Statement, p. 18). The construction of the Turnpike so

authorized, from the New York State line to the Boston suburb of Weston, 123 miles in length, has long since been completed, and from the spring of 1957 the toll expressway so built has carried an immense volume of passenger and commercial traffic across Massachusetts.

Before construction of the original Turnpike was begun the Governor and Council asked the Supreme Judicial Court of the Commonwealth for an advisory opinion as to whether the delegation of powers to the Authority was constitutional. The Justices ruled that it was (*Opinion of the Justices*, 330 Mass. 713; Appendix, *infra*, pp. 10-25).

In 1955 the Legislature inserted in section 1 of the Turnpike Act the words "or from a point or points within said city" to permit the construction by the Turnpike Authority of an extension (known as the "Boston Extension") which would carry the Turnpike from its present eastern terminus at Weston to a point within the city. This amendment raised no additional constitutional questions (see footnote to the District Court's Opinion, Jurisdictional Statement, p. 14).

Bondholders have loaned to the Authority for the Boston Extension $180,000,000, which is held by the defendant The First National Bank of Boston as Trustee (Opinion, Jurisdictional Statement, pp. 13, 14). The Authority has power to issue additional bonds if this sum is insufficient (footnote to Opinion, Jurisdictional Statement, at p. 16). Of this sum $22,750,000 has been put by the Trustees in a "right-of-way account" established to pay for the takings including the lands of the appellants (Jurisdictional Statement, p. 8, footnote).*

*The affidavit referred to in the footnote also stated (what the appellants' footnote omits) that The First National Bank of Boston has posted a bond for that amount—$22,750,000—with the State Treasurer, as security for payment of land damages, in compliance with section 5(*k*) of the Turnpike Act, quoted at p. 24 of the Jurisdictional Statement.

Construction of the Boston Extension, which adds only 12 miles to the original 123, had already been begun by the Turnpike Authority and its contractor, the defendant Perini Corporation, before the filing of the complaint (as alleged therein).

Reasons for Granting the Motion to Affirm.

1. AS TO THE APPELLANTS' CONTENTION THAT THE TURNPIKE LEGISLATION DENIES THEM EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW IN ITS EMINENT DOMAIN PROCEDURES.

In *Benz* v. *New York State Thruway Authority*, 369 U.S. 147 (1962), this Court held that provision of procedures for eminent domain to take land for a highway comparable to the Massachusetts Turnpike does not, simply because different from other eminent domain procedures, thereby deny equal protection or due process.

In *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 584, this Court laid down the rule:

> "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

An imposing list of authorities applying this principle is assembled by Brandeis, J., in his dissenting opinion in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, at p. 42.

The District Court properly applied this principle in this case (Opinion, Jurisdictional Statement, at p. 14):

> ". . . Apart from equal protection, viz., that this is an unlawful discrimination, plaintiffs do not claim a constitutional right to a public hearing. We see ade-

quate distinguishing circumstances. The general statute, which grants the [highway] commission authority to lay out highways, gives no directions of any kind as to any particular one, whereas the present Act, of course, does. There is a difference between a road to be determined by a commission and one designated by the legislature. We do not see any unlawful delegation in permitting the Authority to make the final ministerial selection of the exact path . . ."

The *Opinion of the Justices*, 330 Mass. 713, had held in 1953 that the delegation of authority to the Turnpike Authority to lay out the Turnpike between the terminal points specified by the Legislature was constitutional (Appendix, *infra*, pp. 10-25, especially at pp. 14-16).

Plaintiffs' contention that they have no recourse to judicial review of the constitutionality and legality of land takings by the Authority cannot be seriously considered, in the light of *Luke* v. *Massachusetts Turnpike Authority*, 337 Mass. 304 (1958), wherein the Supreme Judicial Court passed upon the constitutionality and legality of a taking on a petition for a declaratory judgment.

The appellants' claim on this point merits no further argument.

2. As to the appellants' contention that the District Court erred in holding that the plaintiffs must exhaust their administrative remedies afforded by Massachusetts law for obtaining adequate security for land-takings before challenging their constitutionality in this proceeding.

The District Court's ruling on this issue is contained in the last paragraph of its opinion (Opinion, Jurisdictional Statement, p. 17):

"This question, [whether section 40 of chapter 79 of the General Laws provides for adequate security] however, is premature. Before plaintiffs can raise any constitutional issues it is axiomatic that they must exhaust their administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U.S. 41. Plaintiff's first move should have been to seek the relief offered by section 40 itself. *McCarthy* v. *Woburn Housing Authority*, 1960, 341 Mass. 539. If thereafter constitutional infirmities appear in this regard—whether 'thereafter' includes seeking relief in the state courts we do not intimate—it will be time enough to consider them."

The opinion of this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938), supports the action of the District Court.

McCarthy v. *Woburn Housing Authority*, 341 Mass. 539, cited by the District Court, took the same view of the law in ruling on this very section 40 of chapter 79, as incorporated into the Housing Authority statute, holding that the sole remedy for a person who claimed that the Authority had not deposited sufficient security to guarantee the damages for the taking of his land was to apply for his administrative remedy under section 40, and that, not having availed himself of that remedy, he could not raise the issue on a writ of entry.

In *Radler* versus these same defendants (referred to *supra*, p. 2) the Superior Court judge sustained demurrers to similar allegations, on the same ground, that plaintiffs had not had recourse to their administrative remedy (see Appendix B, *infra*, p. 29).

The three-judge Court held that the administrative remedy under section 40 was available to the plaintiffs

(Opinion, Jurisdictional Statement, p. 16), and the Turnpike statute expressly so provides (§ 5(k) at p. 24 of Jurisdictional Statement, quoted in the Court's Opinion, Jurisdictional Statement, p. 15).

The appellants have at no time sought recourse to the administrative channels provided, either to attempt to demonstrate that the total sum of $22,750,000 was inadequate, or that the total sum of $180,000,000 raised for the project will be insufficient to pay for the land and other expenses of construction, or to demonstrate that there is any need of the segregation of a separate fund to cover the value of their respective premises.

The appellants' claim in this point merits no further argument.

An additional, and equally substantial, reason for affirming the judgment below is the entire absence from the appellants' statement of any showing of abuse of discretion in the denial of injunctive relief below.

A great public improvement, to carry the existing Massachusetts Turnpike from its present eastern terminus in Weston, outside the City of Boston, into the center of the city, is now under construction. A general redevelopment of the central part of the City of Boston is in progress, of which the Turnpike's Boston Extension is an integral part.

Some aspects of this large operation are discussed by the Massachusetts Supreme Judicial Court in *Dodge v. Prudential Insurance Co. of America,* 1961 Adv. Sh. 1473, 179 N.E. 2d 234 (Dec. 20, 1961). Although the Boston extension of the Turnpike is now well under way, with preparation of the ground by demolition and by initiated construction, appellants here seek to enjoin its construction on

the undemonstrated theory that they would not get paid a reasonable compensation for their land which was taken for the project. They ask the Court to enjoin the carrying out of this entire project without ever turning to the Massachusetts administrative bodies which are charged with the duty of seeing that their security for payment is adequate. The District Court committed no error in the judgment here appealed from by refusing to enjoin this great project on such grounds.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

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Appendix A.

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL, 330 MASS. 713.

On June 12, 1953, the Justices submitted the following answers to questions propounded to them by the Governor and Council.

To His Excellency the Governor and The Honorable Council of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions contained in your order adopted May 21, 1953, and transmitted to us May 25, 1953. A copy of the order and of chapter 354 of the Acts of 1952, to which the order refers, are attached hereto.

For a proper understanding of the questions and of our answers it is necessary to keep in mind the general nature and certain outstanding features of the statute which has given rise to the doubts expressed in the order. The purpose of the statute, as stated in its title, is "the construction, maintenance, repair and operation of a self-liquidating express highway from a point in the vicinity of the city of Boston to a point at or near the New York State line." To accomplish this purpose the statute sets up as "a public instrumentality" a body politic and corporate to be known as the Massachusetts Turnpike Authority to consist of three members to be appointed by the Governor with the advice and consent of the Council. § 3. The authority is authorized and empowered to construct, maintain, repair, and operate the proposed highway as a toll express highway, to be known as the Massachusetts Turnpike, between the termini as stated in the title and at such location as may be approved by the State department of public works, and to finance the turnpike by issuing bonds of the authority

payable solely from revenues of the turnpike. § 1. § 5 (g). § 8. § 16. Great care is taken to make clear that neither the credit of the Commonwealth nor that of any of its political subdivisions is pledged for payment of the bonds. § 2. The authority is authorized, among other things, to designate the locations and to establish, limit, and control the points of ingress to and egress from the turnpike and to prohibit entrance from points not so designated (§ 5 [1]); and to fix and collect tolls for the use of the turnpike and the different parts or sections thereof. § 10. Under the head of "Incidental Powers" it is further authorized to construct grade separations at intersections; to reconstruct any public highway the location of which it shall find it necessary to change; to vacate or relocate in the manner provided by law any public highway affected by the construction of the turnpike; to enter upon lands, waters, and premises for the purpose of surveys, soundings, drillings, and examinations, making reimbursement for any actual damage resulting therefrom; to make reasonable regulations, including the granting of easements for public utilities and pipe lines, and to order their relocation or removal; to sell or remove buildings or other structures upon lands taken; and to place and maintain or grant permission or easements for ducts, pipes, pipe lines, wires or other structures, and to contract for such permission. § 7. It is further provided that authority shall, when practicable, sell or, if not practicable, shall lease, if a lease be practicable, property taken or purchased and no longer needed. § 7. When all of the bonds shall have been paid or payment provided for, the turnpike is to become part of the State highway system, and the authority is to be dissolved. § 17.

In addition to the provisions of the statute to which reference has been made certain other provisions are so immediately related to the questions and answers that it seems advisable either to quote from them or to summarize

them in greater detail. Thus by § 4 (b) the word "turnpike" is defined as including not only "the express toll highway," or such parts thereof as may be constructed under the act, but also "all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, connecting highways, service stations, restaurants and administration, storage and other buildings and facilities which the Authority may deem necessary for the operation of the turnpike." By § 5 (f) the authority is authorized "To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine." By § 5 (k) the authority is authorized "To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws . . . any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike. . . ." By § 10 the authority is authorized "to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages and restaurants, or for any other purpose except for tracks for railroad or railway use, and to fix the terms, conditions, rents and rates of charges for such use." Section 20 reads as follows: "The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the

decision of such court shall not affect or impair any of the remaining provisions."

The questions contained in the order are these:

"1. Is the general grant of powers to the Massachusetts Turnpike Authority, as set forth in Sections 1, 5 and 7 of Chapter 354 of the Acts of 1952, a constitutional delegation of authority by the General Court?

"2. Does paragraph (f) of said Section 5 providing for the acquisition of 'sites abutting on the turnpike' for the purposes therein set forth, or paragraph (k) providing for the acquisition by eminent domain of 'any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike,' contravene any provision of Article X of Part the First of the Constitution of the Commonwealth?

"3. If there is any unconstitutional delegation of certain powers to the Massachusetts Turnpike Authority by the General Court, would such unconstitutional delegation render said Chapter 354 of the Acts of 1952 unconstitutional in its entirety, in view of Section 20 of said Chapter 354?

"4. Is Chapter 354 of the Acts of 1952 a constitutional exercise of legislative power?"

The doubts which inspired these questions seem to have arisen chiefly, if not wholly, because of the language of art. 10 of the Declaration of Rights as amended by the addition of the last sentence by art. 39 of the Amendments. Article 10 as amended reads, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the

expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.]" For convenience we have set off in brackets the words added by the amendment.

Long before the amendment to art. 10 the delegation by the Legislature to counties, cities, and towns of the general power to take lands by eminent domain for the purpose of ways and other public purposes without description or specification in the enabling act of the lands to be taken had become a commonplace. It had also become recognized and fairly common practice before the subjects were covered by general laws for the Legislature to delegate to private corporations such as canal companies, turnpike companies and railroads power to exercise rights of eminent domain for the public purpose of promoting the transpor-

tation of persons and goods between termini and by routes often described with no greater particularity than is done in the statute now under consideration.[1] A railroad charter of this type came under the examination of this court in *Boston Water Power Co.* v. *Boston & Worcester Rail Road*, 23 Pick. 360, 395-396, and the delegation of the power of eminent domain was held constitutional and valid. Other illustrations in our decisions are found in *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63, 69-70, *Brigham* v. *Agricultural Branch Railroad*, 1 Allen, 316, *Fall River Iron Works Co.* v. *Old Colony & Fall River Railroad*, 5 Allen, 221, and *Housatonic Railroad* v. *Lee & Hudson Railroad*, 118 Mass. 391, 392-393. See *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 340; *Brayton* v. *Fall River*, 124 Mass. 95, 96-97; *Codman* v. *Crocker*, 203 Mass. 146, 154-155; *Lynch* v. *Forbes*, 161 Mass. 302, 308-309. In the present general laws applicable to railroads considerable latitude still remains in the railroad to select its route, subject to control by designated public authorities. G. L. (Ter. Ed.) c. 160, §§ 18-21, § 80.

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[1] See *Opinion of the Justices*, 250 Mass. 591, 596; St. 1791, c. 57 (Massachusetts Canal); St. 1793, c. 21 (Middlesex Canal); St. 1795, c. 21 (Cumberland Canal); St. 1796, c. 5 (First Massachusetts Turnpike Corporation); St. 1796, c. 72 (Second Massachusetts Turnpike Corporation); St. 1799, c. 48 (Eighth Massachusetts Turnpike Corporation); St. 1829, c. 12 (Providence and Bristol Turnpike Corporation); St. 1829, c. 26 (Worcester Rail Road Company); St. 1829, c. 93 (Franklin Rail Road Company); St. 1829, c. 94 (Massachusetts Rail Road Corporation); St. 1829, c. 95 (Boston, Providence and Taunton Rail Road Corporation); St. 1830, c. 4 (Boston and Lowell Rail Road Corporation); St. 1831, c. 56 (Boston and Providence Rail-Road Corporation); St. 1831, c. 57 (Boston and Ontario Rail Road Corporation); St. 1832, c. 97 (Pittsfield and West Stockbridge Rail Road Company); St. 1833, c. 109 (Andover and Wilmington Rail Road Corporation); St. 1833, c. 116 (Western Rail Road Corporation). The foregoing list is not intended to be complete.

These are simply instances falling within the recognized principle that the Legislature, having adopted a policy, may delegate the working out of the details of that policy. See *Commonwealth* v. *Hudson*, 315 Mass. 335, 341; *Scannell* v. *State Ballot Law Commission*, 324 Mass. 494, 501-502; *Treasurer of Worcester* v. *Department of Labor & Industries*, 327 Mass. 237, 241. *Springfield Institution for Savings* v. *Worcester Federal Savings & Loan Association*, 329 Mass. 184.

From what has been said we think it sufficiently appears that if art. 10 of the Declaration of Rights had not been amended by art. 39 of the Amendments in the manner indicated by the brackets inserted in the amended art. 10 as above quoted, there would be no serious question as to the power of the Legislature in general to delegate rights of eminent domain to the Massachusetts Turnpike Authority for the purpose of constructing a great highway. If such rights can be delegated to a private corporation serving the public such as a railroad or other public service corporation it would be difficult to see why art. 10, as unamended, or anything else in the Constitution, would stand in the way of a similar delegation to a public corporation like the authority the members of which are appointed by the Governor. Such delegation by the Legislature would be a sufficient "consent" of "the representative body of the people" to comply with the requirement of such consent for the taking of private property contained in the second sentence of art. 10.

It next becomes necessary to examine the amendment to art. 10 added by art. 39 of the Amendments to ascertain its exact meaning in restricting or enlarging the legislative power of delegation, and this examination must be made in the light of the public exigency which called forth the amendment. *General Outdoor Advertising Co. Inc.* v. *De-*

partment of Public Works, 289 Mass. 149, 158. *Opinion of the Justices*, 324 Mass. 746, 749.

It appears from *Opinion of the Justices*, 204 Mass. 607, and *Opinion of the Justices*, 204 Mass. 616, that in the early part of the year 1910, as a result of a report of the joint board on metropolitan improvements which had been created the preceding year, the Legislature had before it a proposal for the construction for commercial purposes of a broad street or streets in the city of Boston which involved the taking of private lands on the sides of the proposed street or streets, not as part of such street or streets or to serve any purpose of such street or streets, but solely for the purpose of division into suitable lots to be sold to private owners under conditions designed to develop the location for commerce, trade, and industry. The Justices gave their opinion that private lands could not be taken by eminent domain for the purpose of resale to other private owners with the object of promoting a commercial development in the manner proposed. The Justices advised that this would be an unconstitutional use of the power of eminent domain and of public moneys for a purpose not public in character. Article 39 of the Amendments was adopted by the Legislatures of that same year and of the year following and was approved and ratified by the people on November 7, 1911. The amendment, as hereinbefore quoted, expressly provides that the Legislature may, for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city, or town, "of more land and property than are needed for the actual construction of such highway or street," provided that the land and property authorized to be taken are specified in the act "and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or streets." The amend-

ment further provides that the land not needed for the highway or street may be authorized to be sold with or without suitable restrictions. In our opinion the conclusion is practically inescapable that the design of this amendment was not to limit the power which the Legislature previously possessed under art. 10 to delegate the right of eminent domain but was to enlarge that power so as to allow the Legislature to do what the Justices had previously advised it could not do, that is, to authorize under certain carefully stated restrictions and limitations the taking of land not intended for purposes of the highway or street but intended for development of the locality.

It follows that the Legislature still possesses all the power of delegation held and frequently exercised by it before the amendment, and that the restrictions and limitations contained in the amendment apply only where the Legislature authorizes the taking of "more land and property than are needed for the actual construction of such highway or street." It becomes necessary therefore to determine whether by St. 1952, c. 354, the Legislature has attempted to authorize the taking of more land than is needed for the actual construction of the turnpike. If it has, since the statute does not comply with the limitations and restrictions of the amendment, the statute is invalid in so far as it relates to the taking of such additional land. And in determining whether the act does attempt to authorize the taking of more land than that needed for the turnpike we must first determine what are the component parts of the turnpike itself.

It is evident that this is to be no ordinary highway of the kind with which our history has made us familiar. It is an entirely new type of highway which has made its appearance only in comparatively recent years as a result of the many changes in the lives and customs of the people brought about by the introduction and general use of the automo-

bile. It will run practically the entire length of the main part of the State. It will doubtless consist of a number of paved lanes properly separated and graded to permit of safe operation at high speeds comparable perhaps to the speeds of passenger trains on railroads. It is to be expected that there will be few, if any, grade crossings. There are to be ingress and egress only at designated points, which in some instances may be miles apart. There will be signs, signals, and perhaps safety devices of one kind or another. There must be space along the sides of the main portion of the way to afford opportunity for slowing down or stopping or for disabled vehicles without interference with the general flow of traffic. In fact in some respects such a way more nearly resembles a new railroad system crossing the State than it resembles the traditional road leading from one town to another. It differs still more from the ordinary city street. Such a road cannot merely be constructed and opened to the public. It must be operated. This involves inspection, supervision, and a constant preparedness to remove obstructions and make necessary repairs. This in turn is likely to involve the use of road machinery, towing vehicles, snow plows, and sanding equipment, which must be kept in readiness and may have to be stored at proper places along the way. For all this buildings may be required, as well as a reasonable provision for garages where necessary repairs can be made both upon the equipment of the turnpike and in order to keep the vehicles of travellers in operable condition. Similarly it will be necessary to provide gasoline stations at reasonable intervals. These auxiliary structures bear a relation to the turnpike similar to that which the switch towers, water tanks, round houses, and stations bear to a railroad. These structures are parts of the railroad, although not parts of the track.

What land is needed for the actual construction of this new type of turnpike and what forms part of it and what is outside of it are matters not to be determined by the same standards as would be applied in the case of the country road of fifty or even of twenty-five years ago. This enterprise must be envisioned as a whole in its larger aspects. In our opinion not only the worked portion of the roadway, including, of course, bridges, abutments, embankments and approaches, but also the kinds of buildings and other structures which we have mentioned and a reasonable amount of land taken or acquired on which to place them are all "needed for the actual construction" of the highway and are parts of it and will be taken or acquired for and devoted to a public use, and land taken for such purposes will not be "more land and property than are needed for the actual construction" of the highway. We think therefore that reasonable takings for these purposes may be authorized by the Legislature under the powers which it possessed before the amendment to art. 10 and which were not cut down by that amendment. Such takings will not be for resale to private individuals. There is involved nothing in the nature of a real estate development which the amendment was designed both to permit within limits and to regulate. The requirements of the amendment are inapplicable.

More doubt may exist as to restaurants, but on the whole, in dealing with such a highway as the proposed turnpike, we are inclined to classify them with the services previously mentioned. Undoubtedly many travellers will seek food on their way across the State. It will be a great convenience to them to find it at a place where they can park their vehicles without interfering with traffic and without the necessity of looking for an exit, searching for a restaurant, and then reëntering the turnpike. The utility of restaurants in connection with travel is attested by the facts that they

have long been a customary feature in railroad stations and are now commonly found at the larger airports. The provision for restaurants may also have some tendency to reduce the amount of stopping along the route and to keep the roadway free of refuse. We think restaurants such as are provided for in the act are parts of the turnpike, and that a reasonable amount of land taken for them is land "needed for the actual construction" of the highway and is devoted to a public use. It seems that the Legislature regarded all these auxiliary structures to which reference has been made as parts of the turnpike, since it included all of them in the definition of "turnpike" in § 4 (b) of the act, and we do not believe that the references to "sites abutting on the turnpike" in § 5 (f) and to "abutting property" in § 5 (k) were intended to narrow the previous definition. It seems obvious that what was said in *Commonwealth* v. *Morrison*, 197 Mass. 199, 205, about a lunch cart obstructing the street in Adams Square in Boston has no bearing upon the nature of a restaurant upon this turnpike as a public use of land. See also *Motoramp Garage Co.* v. *Tacoma*, 136 Wash. 589.

In reaching our conclusions we have derived some assistance from the New York cases of *Blunk* v. *Browne*, 217 App. Div. (N. Y.) 624, *Anderson* v. *Taconic State Park Commission*, 262 App. Div. (N. Y.) 892, affirmed, 287 N. Y. 668, and *People* v. *La Frantz*, 188 Misc. (N. Y.) 989, dismissed for failure to prosecute appeal, 302 N. Y. 699.

The provisions in § 5 (f) of the act for the leasing by the authority of "gasoline stations, restaurants and other services" are not unconstitutional. They do not involve the taking or holding of lands for private purposes. Property leased will still be devoted to the public purpose of the turnpike, to which these services are wholly subordinate. "While land cannot ordinarily be taken by eminent domain for the purpose of renting and sale . . . this principle is

inapplicable where, as here, the property so rented or sold is thereby devoted to a public purpose." *Opinion of the Justices*, 321 Mass. 766, 770. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 377-378. *McLean* v. *Boston*, 327 Mass. 118, 121. See *Murphy* v. *Commonwealth*, 187 Mass. 361, 375; *Wright* v. *Walcott*, 238 Mass. 432, 438; *D. N. Kelley & Son, Inc.* v. *Selectmen of Fairhaven*, 294 Mass. 570, 574-575.

Neither do we think that any difficulty arises from the use of the indefinite expressions "other buildings and facilities which the Authority may deem necessary for the operation of the turnpike" in § 4 (b) of the act and "other services" in § 5 (f). We think it clear that these expressions are to be construed in their respective settings and that they refer only to such buildings, facilities and services as are reasonably necessary for the public purposes of the turnpike as described in the act.

The power granted in § 5 (k) to take "abutting property to preserve and protect the turnpike" is not, we think, a grant of power to take more land than is "needed for the actual construction" of the highway as the words just quoted are used in the amended art. 10 as hereinbefore interpreted. Land really needed to preserve and protect the turnpike is needed for its actual construction within the meaning of art. 10. Doubtless this power to take "abutting property" would be construed with considerable strictness. It is not a roving commission.

We are not entirely clear as to the interpretation to be given to the first question. Sections 1, 5, and 7 of the act, referred to in this question, contain some provisions of such breadth that the widest possible interpretation of the question itself would require us to pass upon practically every separate detailed provision contained in the act, including provisions as to which no direct reference is made and no

doubts are expressed in the order. We do not believe this was intended. We think that this question was designed to ask whether the general plan or scheme of the act whereby power is delegated to the Massachusetts Turnpike Authority to construct the "Massachusetts Turnpike" from a point in the vicinity of Boston to a point at or near the New York line and to exercise rights of eminent domain for that purpose, without further specification in the grant of powers of the location of the turnpike or of the property authorized to be taken, is constitutional without consideration of the particular provisions of § 5 to which reference is made in the second question or of each other particular provision of the act. To this question, so construed, our answer is "Yes." In dealing with this question in this manner we do not mean to imply that we have discovered constitutional difficulties in any part of the act to which no reference is made in the questions or in these answers. We mean simply to preserve the view which the Justices have taken for many years that they cannot properly be called upon to answer a question whether a long and complicated act is constitutional in each and every part without having their attention directed to the particular parts as to which doubts have arisen. *Opinion of the Justices,* 328 Mass. 679, 691, and citations there contained.

To the second question our answer is "No."

In view of what has been said the third question scarcely need be answered; but a brief comment may be proper. When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part. *Ashley*

v. *Three Justices of the Superior Court,* 228 Mass. 63, 81. This may sometimes involve a difficult decision. Where the statute contains a severability clause like that embodied in § 20 of the act here involved, this is a declaration by the Legislature that it intends to have the principle of severability invoked wherever possible. No doubt there are many provisions in St. 1952, c. 354, which are so far collateral and ancillary to the main object of constructing the turnpike that the provisions for accomplishing that main object could stand even if the collateral and ancillary provisions were invalid. Thus it would seem that the fundamental provisions of the act would not be invalidated even if the provision for acquiring sites abutting on the turnpike for the purposes mentioned in § 5 (f) were held invalid; or it might well be held that land could be acquired for such purposes by purchase even if it could not be acquired for such purposes by eminent domain. But inasmuch as in our opinion all provisions of the statute to which our attention has been directed are valid it does not seem profitable to pursue this subject further.

The fourth question asks whether c. 354 of the Acts of 1952 is constitutional without mentioning any particular parts of that statute or informing us as to the nature of any doubts concerning it. This is the sort of question which, as hereinbefore stated, the Justices feel that they are not required to answer. We have answered with considerable fullness all questions of a specific nature where our attention has been directed to the doubts intended to be resolved. We respectfully request that we may be excused from answering the fourth question.

We feel compelled to add that we have entertained serious question as to whether the order of His Excellency the Governor and the Honorable Council shows that they have such present duties to perform in connection with St. 1952, c. 354, as to make this a solemn occasion within the purview

of Part II, c. 3, art. 2, of the Constitution. But in view of the statement in the order that doubts exist as to the power and authority of the executive department of the Commonwealth and the power and duty of officers under its direction to proceed to the discharge of functions assigned to them under that chapter, and in view of the possibility that because of the importance of the statute and the many ramifications connected with such an extensive enterprise as the construction of the turnpike there may well exist or soon arise problems for consideration of His Excellency the Governor and of the Honorable Council of which we are not aware, we have preferred to cast aside our own doubts as to the existence of a solemn occasion and to submit these answers. We do this, however, without intending to depart from the construction heretofore given to Part II, c. 3, art. 2, of the Constitution. See *Opinion of the Justices*, 269 Mass. 611, 618-619.

STANLEY E. QUA.
HENRY T. LUMMUS.
JAMES J. RONAN.
RAYMOND S. WILKINS.
JOHN V. SPALDING.
HAROLD P. WILLIAMS.
EDWARD A. COUNIHAN, JR.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HARRY K. AHOYIAN,
SATENIG AHOYIAN,
HI MANNING,
ELIZABETH BOSWELL,
HAM WUEN CHIN,
GIM SUNG CHIN,
HELEN J. AMES,
DWIGHT S. STRONG, and
ELEANOR B. STRONG

v.

MASSACHUSETTS TURNPIKE AUTHORITY,
PERINI CORPORATION, and
FIRST NATIONAL BANK OF BOSTON, Trustee

Civil Action
No. 62-332-F

ORDER

May 9, 1962

FORD, D.J.

The above-entitled action came before the Court on application of the plaintiffs' counsel for issuance of a temporary restraining order in accordance with the third prayer of the complaint; and after due consideration by this Court, it is hereby

ORDERED that the application for issuance of a temporary restraining order is denied.

By the Court

AUSTIN W. JONES, JR.,
Deputy Clerk

Order entered May 9, 1962

JOHN A. CANAVAN, Clerk
by Grace V. Flood, Deputy Clerk

Enter May 9, 1962

FORD U.S.D.J.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HARRY K. AHOYIAN et als
v.
MASSACHUSETTS TURNPIKE AUTHORITY et als

Civil Action
No. 62-332-F

MEMORANDUM
June 21, 1962

The plaintiffs in the above-entitled action have filed three motions:

(1) Motion to vacate judgment;
(2) Motion for rehearing;
(3) Motion to alter or amend judgment.

All the motions are denied.

FRANCIS J. W. FORD
Judge, United States District Court

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 79,683 Equity

HYMAN RADLER
v.
MASSACHUSETTS TURNPIKE AUTHORITY, et als

July 10, 1962: Application for injunction under prayer 2 denied after hearing, by the court, TAURO, J.

Appendix E.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT
No. 79683 EQ.

HYMAN RADLER
v.
MASSACHUSETTS TURNPIKE AUTHORITY, PERINI CORPORATION, and FIRST NATIONAL BANK OF BOSTON, Trustee.

FINDINGS, RULINGS, AND ORDER

The hearings before me were on defendants' special demurrers, and defendants' plea in bar.

It was agreed by counsel, and I so find, that the plaintiff in this action was one of eighteen plaintiffs in the case of Harry K. Ahoyian, et al v. Massachusetts Turnpike Au-

thority, et al, U. S. District Court for the district of Massachusetts, Civil Action #62,332-F.

It was further agreed by counsel, and I so find, that present issues, in essence, are the same as those in the Federal Court case referred to.

When this case was argued by counsel, I had before me copies of the pleadings, decision and Judgment of the Federal Court dated June 4, 1962. By this decision, the Federal Court, on motion of the defendants, dismissed the plaintiff's action, and Judgment was entered thereon.

(1) *Defendants Special Demurrers.*

All of defendants special demurrers are sustained.*

(2) *Plea in Bar.*

The defendants plead in bar of this action the decision and judgment of the United States District Court in the case referred to. The plaintiff in the present suit was one of eighteen plaintiffs in the Federal case. The Federal case raised the same issues as the instant case. In that case the defendants moved for dismissal on the ground that the complaint failed to state a cause of action. The case was heard and dismissed by a three-Judge Court with an opinion stating the grounds for dismissal.

The Federal Court decision, in my opinion, contained the following rulings:

(1) That the Massachusetts Turnpike Act St. 1952 C. 354 as amended by St. 1955 C. 47 does not violate

*Among the special demurrers sustained were those to allegations that G.L. c. 79, § 40, did not afford the plaintiff a plain and adequate remedy to challenge the sufficiency of security; the ground of demurrer being "that the plaintiff should pursue and exhaust the administrative remedy provided by G.L. c. 79, § 40 before challenging the availability and adequacy thereof in this proceeding."

the 5th and 14th amendments of the United States Constitution and that it does not violate the provisions of the State Constitution.

(2) The plaintiff had an administrative remedy to obtain adequate security for the value of his land under provisions of G.L. C. 79 sec. 40, as modified, and made applicable to land takings by the Turnpike Authority, by St. 1952 C. 354—5-K.

(3) The action of plaintiffs was premature. The U.S. Court said: "Before the plaintiffs can raise any constitutional issues, it is axiomatic that they must exhaust their administrative remedies."

The decision of the Federal Court is a bar to further litigation on all issues which were decided by that court on the merits.

The motion to dismiss in the Federal Court is similar to a demurrer in our state court. Ordinarily the sustaining of a demurrer can not be the basis for res judicata. But it may be. Old Dominion Copper Mining and Smelting Co., v. Bigelow, 203 Mass 159, 205. Capaccio v. Merrill 222 Mass. 308-310.

There can be little doubt that the Federal Court rulings on the constitutional questions are res judicata on future litigation by the same parties on the same issues.

The remaining question is whether the District Court's decision that the plaintiff must first exhaust his administrative remedies before questioning the constitutionality of G.L. C. 70, sec. 40 as modified and made applicable to land takings by the Turnpike Authority, is res judicata and a bar to the present action.

Under the Federal Rules of Civil Procedure, (Rule 41(b)) the decision and order of dismissal by the Three-Judge Court was an adjudication on the merits unless the

Court otherwise specifies, or unless dismissal was for lack of jurisdiction or improper venue.

The learned briefs of both parties, together with their supplementary briefs requested by me were carefully reviewed.

What at first seems a legal problem of simple solution presents questions of magnitude and complexities.

Was the Federal Court decision on the merits of the case? Was its decision jurisdictional? Was it based on substantive or adjective law? Does the rule requiring the exhausting of administrative remedies apply when the constitutionality of the statute containing such provisions is being questioned? Does the law pertaining to full faith and credit apply? Where the Federal Court case was not based on diversity of citizenship, was the U. S. Court bound to follow the procedural rules of the state court?

The case of Angel v. Bullington 330 U. S. 183 presents the closest analogy to the present problem that has come to my attention. The majority opinion, as stated by Justice Frankfurter, seems to be authority for the position taken by the defendants. Dissenting opinions by Justices Reed, Rutledge, and Jackson take the opposite view. I found the reasoning and logic in the dissenting opinions powerful and persuasive.

However, majority opinions of the highest court in the land should serve as guide posts for our trial courts.

The defendants' plea in bar is allowed.

G. Joseph Tauro
Justice, Superior Court.

Entered Sept. 19, 1962